83 - 1834 (2)

No.

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In the Supreme Court of the United States

October Term, 1983

MARY ANNE ROBERTSON, *Petitioner,*

vs.

FLORIDA BOARD OF BAR EXAMINERS,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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FLORIDA BOARD OF BAR EXAMINERS

RE: APPLICANT.

No. 60550.

Supreme Court of Florida.

Nov. 10, 1983.

Rehearing Denied Feb. 9, 1984.

Original Proceedings—The Florida Board of Bar Examiners.

Parker D. Thomson and Richard J. Ovelmen of Paul and Thomson, Miami, for petitioner.

Marvin E. Barkin, Chairman, Tampa, and C. Graham Carothers, Tallahassee, for respondent, Florida Board of Bar Examiners.

PER CURIAM.

Petition for review is denied. *Florida Board of Bar Examiners re Applicant,* 443 So.2d 71 (Fla.1983).

It is so ordered.

ALDERMAN, C.J., and BOYD, OVERTON and McDONALD, JJ., concur.

ADKINS, J., dissents.

FLORIDA BOARD OF BAR EXAMINERS

RE: APPLICANT.

No. 60550.

Supreme Court of Florida.

February 9, 1984.

On consideration of this Motion for Rehearing filed by attorneys for Applicant and reply thereto,

IT IS ORDERED by the Court that said Motion be and the same is hereby denied.

Sid J. White
Clerk, Supreme Court

By: /s/
Deputy Clerk

cc: Parker D. Thomson, Esquire
Richard J. Ovelmen, Esquire
Marvin E. Barkin, Esquire
C. Graham Carothers, Esquire

FLORIDA BOARD OF BAR EXAMINERS

RE: APPLICANT.

No. 63161.

Supreme Court of Florida.

Nov. 3, 1983.

Rehearing Denied Jan. 25, 1984.

In original proceedings, bar admission applicant sought review of ruling by the state Board of Bar Examiners refusing to process bar admission application until applicant answered certain questionnaire items and authorized release of certain records. The Supreme Court, Alderman, C.J., held that: (1) action of the state Board of Bar Examiners in requiring bar admission applicant to disclose history of psychological and medical treatment and to authorize release of all records, medical and otherwise, relevant to applicant's good moral character and fitness to perform responsibilities of an attorney was least intrusive means to achieve compelling state interest and did not violate state or federal constitutional privacy provisions, nor did it contravene applicant's due process rights or rights guaranteed by state constitutional section providing that no person shall be deprived of any right because of physical handicap, and (2) Board's requirement did not violate applicant's rights under statutory provision relating to confidentiality of psychotherapist-patient communications, inasmuch as applicant himself placed mental and emotional fitness, as well as moral and educational fitness, in issue when he filed application seeking admission to practice law.

Board action approved.

Adkins, J., dissented and filed opinion.

1. Constitutional Law (Key) 82(7)

Privacy right under Florida Constitution was not intended to provide absolute guarantee against all governmental intrusion into private life of individual. West's F.S.A. Const. Art. 1, §23.

2. Constitutional Law (Key) 82(7)

Action of the state Board of Bar Examiners in assisting the Supreme Court in regulating admission of persons to practice of law constitutes governmental action, for purposes of constitutional privacy provision. West's F.S.A. Const. Art. 1, § 23; Art. 5, § 15.

3. Attorney and Client (Key) 3
Constitutional Law (Key) 82(6)

No constitutional right exists to be admitted to state bar; rather, practice of law is a privilege. West's F.S.A. Admission to Bar, Art. 3, § 2.

4. Constitutional Law (Key) 82(7)

Compelling state interest or strict scrutiny standard imposes heavy burden of justification upon state to show important societal need and use of least intrusive means to achieve that goal.

5. Constitutional Law (Key) 82(7)

State's interest in ensuring that only those fit to practice law are admitted to the bar is a compelling state interest for purposes of strict scrutiny standard of review of admission requirements as a purported intrusion on right of privacy. West's F.S.A. Admission to Bar, Art. 3, § 2.

6. Attorney and Client (Key) 7

In view of lawyer's constant interaction with public, wide range of factors must be considered in bar admission applicant's screening process which would not customarily be considered in licensing of tradesman and businessman. West's F.S.A. Admission to Bar, Art. 3, § 3(a).

7. Constitutional Law (Key) 82(7)

Action of the state Board of Bar Examiners in requiring bar admission applicant to disclose history of psychological and medical treatment and to authorize release of all records, medical and otherwise, relevant to applicant's good moral character and fitness to perform responsibilities of an attorney was least intrusive means to achieve compelling state interest and did to [sic] violate state constitutional privacy provision. West's F.S.A. Const. Art. 1, § 23; West's F.S.A. Admission to Bar, Art. 3, § 3(a).

8. Constitutional Law (Key) 82(7)

Privacy interests encompassed within decision making or autonomy zone of privacy, to which compelling state interest test is applicable, are only those which are fundamental or implicit in concept of ordered liberty.

9. Constitutional Law (Key) 82(7)

Requirement of Board of Bar Examiners that bar admission applicant disclose history of psychological and medical treatment and authorize release of all records, medical and otherwise, relevant to applicant's good moral character and fitness to perform responsibilities of an attorney does not violate applicant's federal constitutional right of privacy. U.S.C.A. Const.Amend. 4.

10. Constitutional Law (Key) 287.2(5)

Requirement of state Board of Bar Examiners that bar admission applicant disclose history of psychological and medical treatment and authorize release of all records, medical and otherwise, relevant to applicant's good moral character and fitness to perform responsibilities of an attorney does not violate applicant's due process rights, or section of State Constitution providing that no person shall be deprived of any right because of physical handicap. U.S.C.A. Const.Amend. 14; West's F.S.A. Const. Art. 1 § 2.

11. Attorney and Client (Key) 7

Refusal by state Board of Bar Examiners to process bar admission application, due to failure of applicant to respond to inquiries requiring disclosure of history of psychological and medical treatment and authorization of release of all records, medical and otherwise, relevant to applicant's good moral character and fitness to perform responsibilities of an attorney did not violate applicant's right under state statutory provision relating to confidentiality of psychotherapist-patient communications; by filing application for admission to practice law in state, applicant himself placed mental and emotional fitness, as well moral and educational fitness, in issue. West's F.S.A. §§ 90.503, 90.503(4)(c).

Steven M. Goldstein, Tallahassee, for petitioner.

Marvin E. Barkin, Chairman, Tampa, and C. Graham Carothers, Tallahassee, for respondent, Florida Board of Bar Examiners.

ALDERMAN, Chief Justice.

Applicant seeks review of a ruling by the Board of Bar Examiners refusing to process his application for ad-

mission to The Florida Bar until he answers item 28(b) of the applicant's questionnaire and affidavit and until he executes the authorization and release form required by the Rules of the Supreme Court Relating to Admissions to the Bar. Applicant maintains that the Board's action violates his right of privacy and his right to due process of law guaranteed by the Florida and United States Constitutions, and his rights guaranteed by section 90.503, Florida Statutes (1981), and article I, section 2 of the Florida Constitution. We find no merit to his contentions and approve the decision of the Florida Board of Bar Examiners requiring applicant to complete all portions of the questionnaire, including item 28(b), and to execute an unaltered authorization and release form before the Board will process his application for admission to The Florida Bar.

Applicant applied for admission to The Florida Bar in April 1982 by submitting application for admission form No. 1 and a modified authorization release. On his authorization release, he included a proviso that his release did not apply to his medical records. On his application, he expressly declined to answer question 28(b) on the basis that it violates his constitutional rights. In answering the questionnaire, the applicant disclosed under item 12 that he had served on active duty with the United States Marine Corps and that he had not been discharged, but rather had been transferred to a temporary retired list for medical reasons and later had been retired.

Item 28(b) asks:

> Have you ever received REGULAR treatment for amnesia, or any form of insanity, emotional disturbance, nervous or mental disorder? .....
>
> Yes or No

> If yes, please state the names and addresses of the psychologists, psychiatrists, or other medical practitioners who treated you. (Regular treatment shall mean consultation with any such person more than two times within any 12 month period.)[1]

The authorization and release form provided by the Board in compliance with the rules of admission states:

> I, ..., having filed an application with the Florida Board of Bar Examiners and fully recognizing the responsibility to the Public, the Bench, and the Bar of this State lodged with the Florida Board of Bar Examiners by the Supreme Court of Florida under the Constitution of the State of Florida to determine that only those of high character and ability are admitted to The Bar of Florida, hereby authorize and request every medical doctor, school official, and every other person, firm, officer, corporation, association, organization or institution having control of any documents, records or other information pertaining to me *relevant to my good moral character and fitness to perform the responsibilities of an attorney,* to furnish the originals or copies of any such documents, records and other information to said Board, or any of its representatives, and to permit said Board, or any of its representatives, to inspect and make copies of any such documents, records and other information including but not limited to any and all medical reports, laboratory reports, X-rays, or clinical abstracts which may have been made or prepared pursuant to, or in connection with, any examina-

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1. By letter dated August 23, 1982, the executive director of the Board advised applicant that question 28(b) was reviewed at a recent Policy Session of the Board, and the number of visits to a psychologist, psychiatrist, or other medical practitioner was raised to four times in any twelve-month period.

tion or examinations, consultation or consultations, test or tests, evaluation or evaluations, of the undersigned.

I hereby authorize all such persons as set out above to answer any inquiries, questions, or interrogatories concerning the undersigned which may be submitted to them by the Florida Board of Bar Examiners or its authorized representative, and to appear before said Board, or its authorized representative, and to give full and complete testimony concerning the undersigned, including any information furnished by the undersigned. I hereby relinquish any and all rights to said reports, including but not limited to clinical abstracts, consultations, evaluations, or any other information incident in any way to cooperation with the Florida Board of Bar Examiners, or its authorized representative, and fully understand that I shall not be entitled to have disclosed to me the contents of any of the foregoing.

I hereby release and exonerate every medical doctor, school official, and every other person, firm, officer, corporation, association, organization or institution which shall comply in good faith with the authorization and request made herein from any and all liability of every nature and kind growing out of or in anywise pertaining to the furnishing or inspection of such documents, records and other information or the investigation made by said Florida Board of Bar Examiners. The undersigned further waives absolutely any privilege ....he may have *relevant to h..... good moral character and fitness to perform the responsibilities of an attorney* under Sections 90.242 and 490.32 Florida Statutes.

(Emphasis supplied.)

The executive director of the Board, on behalf of the Board, advised the applicant that processing of his application would be withheld for ten days pending receipt of an executed and unaltered authorization and release and a response to question 28(b). More correspondence between the Board and the applicant ensued for several months, concluding in the Board's decision not to process his application until he complied with the requirements of the Board.

[1] Applicant seeks review of the Board's refusal to process his application and initially contends that to require him to answer question 28(b) and to submit an unconditional authorization and waiver violates his constitutional right of privacy under the Florida and United States Constitutions.

Article 1, section 23 of the Florida Constitution provides:

> Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

Applicant concedes and we agree that this constitutional provision was not intended to provide an absolute guarantee against all governmental intrusion into the private life of an individual.

[2] Preliminarily, we must determine whether the requirement that applicant answer item 28(b) and execute the authorization and release falls within the governmental intrusion as contemplated by article I, section 23, and, if so, we must decide whether this intrusion violates the applicant's constitutional right of privacy. The action of

the Board clearly is not within the exception proviso of article I, section 23.[2] It is just as evident that the Board's action does constitute governmental action. The exclusive jurisdiction to regulate admission of persons to the practice of law is vested in this Court. Art. V, § 15, Fla. Const. We established the Florida Board of Bar Examiners as an arm of this Court to assist us in this function.

[3] We also find that the applicant's right of privacy is implicated by item 28(b) and the authorization and release form which allow a limited intrusion into his private life. The extent of his privacy right, however, must be considered in the context in which it is asserted and may not be considered wholly independent of those circumstances. He has chosen to seek admission into The Florida Bar. He has no constitutional right to be admitted to the Bar. Rather, the practice of law in this state is a privilege. *State ex rel. The Florida Bar v. Evans,* 94 So.2d 730 (Fla.1957). In this case, the applicant's right of privacy is circumscribed and limited by the circumstances in which he asserts that right. By making application to the Bar, he has assumed the burden of demonstrating his fitness for admission into the Bar. Fla.Sup.Ct. Bar Admiss. Rule, art. III, § 2. This encompasses mental and emotional fitness as well as character and educational fitness.

[4] Although circumscribed and limited by the context in which it is asserted, the applicant does have a right of privacy, and we must determine whether it has been unconstitutionally intruded upon by the Board's requirements. We have not yet decided a case in which

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2. The exception proviso of article 1, section 23, states:

"This section shall not be construed to limit the public's right of access to public records and meeting as provided by law."

we have had to determine the appropriate standard of review in assessing a claim of unconstitutional governmental intrusion into one's privacy rights under article I, section 23. We need not make that decision in the present case since we find that the Board's action meets even the highest standard of the compelling state interest test.

The compelling state interest or strict scrutiny standard imposes a heavy burden of justification upon the state to show an important societal need and the use of the least intrusive means to achieve that goal. *Carey v. Population Services International*, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977); *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *In re Estate of Greenberg*, 390 So.2d 40 (Fla. 1980).

[5] Applicant concedes and we agree that the state's interest in ensuring that only those fit to practice law are admitted to the Bar is a compelling state interest. He admits that there is a legitimate need for the intrusion. His concern is not with the end sought to be achieved by the Board but is rather with the means employed by the Board to fulfill its responsibilities. He asserts that the authorization and release form and item 28(b) are unnecessarily overbroad and suggests that there should be some time limitation relative to the information sought.

That the state has a compelling state interest in regulating the legal profession has been expressly recognized by the Supreme Court of the United States. In *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), that Court said:

> [A]s part of their power to protect the public health, safety, and other valid interests [states] have broad power to establish standards for licensing practitioners

> and regulating the practice of professions. . . . The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice and have historically been "officers of the courts."

421 U.S. at 792, 95 S.Ct. at 2016.

[6] In charging the Board with the duty to determine the character and fitness of applicants to The Florida Bar, we have required that:

> Prior to recommending an applicant for admission to practice the profession of law in Florida, the Florida Board of Bar Examiners shall conduct an investigation and otherwise inquire into and determine the character, fitness, and general qualifications of every applicant. In every such investigation and inquiry, the Board may obtain such information as bears upon the character, fitness and general qualifications of the applicant and take and hear testimony, administer oaths and affirmations, and compel, by subpoena, the attendance of witnesses and the production of books, papers and documents. Any member of the Board may administer such oaths and affirmations. Such investigations and inquiries shall be informal, but they shall be thorough, with the object of ascertaining the truth. Technical rules of evidence need not be observed. Any investigative hearing for such purpose may be held by a division of the Board consisting of not less than three members of the Board. Each division shall record its proceedings and shall report its decisions to the full Board. Formal hearings held in response to Specifications shall be conducted before a quorum of the Board which shall consist of not less than five members.

Fla.Sup.Ct. Bar Admiss. Rule, art. III, § 3(a). It is imperative for the protection of the public that applicants to the Bar be thoroughly screened by the Board. Necessarily, the Board must ask questions in this screening process which are of a personal nature and which would not otherwise be asked of persons not applying for a position of public trust and responsibility. Because of a lawyer's constant interaction with the public, a wide range of factors must be considered which would not customarily be considered in the licensing of tradesmen and businessmen. *The Florida Bar, Petition of Rubin,* 323 So.2d 257 (Fla. 1975). The inquiry into an applicant's past history of regular treatment for emotional disturbance or nervous or mental disorder requested by item 28(b) furthers the legitimate state interest since mental fitness and emotional stability are essential to the ability to practice law in a manner not injurious to the public. The pressures placed on an attorney are enormous and his mental and emotional stability should be at such a level that he is able to handle his responsibilities.

[7] We find that the Board has employed the least intrusive means to achieve its compelling state interest. The information sought by item 28(b) is vital to the Board in evaluating an applicant's fitness. To ensure that it has all of the information necessary for its evaluation, the Board rather than the applicant must be the judge of what part of the applicant's past history is relevant.

There is no precise list of medical conditions that may affect a person's fitness to practice law and no uniformity among people who suffer from these conditions. The means employed by the Board cannot be narrowed without impinging on the Board's effectiveness in carrying out its important responsibilities. A time limitation on the information sought could preclude the Board from obtaining

vitally relevant information which could impact on its decision as to an applicant's mental and emotional fitness to practice law. The fact that the information obtained in response to the Board's inquiry is held in confidence by the Board and by this Court minimizes the intrusion on an applicant's privacy. Additionally, the authorization and release form, contrary to applicant's assertion, is not a blanket release but rather is expressly limited to information *relevant* to an applicant's "good moral character and fitness to perform the responsibilities of an attorney." We hold that the Board's action does not violate article I, section 23 of the Florida Constitution.

[8, 9] We also hold that the Board's action does not violate applicant's federal constitutional right of privacy. In view of our disposition of this first issue, it is unnecessary for us to address, in any detail, applicant's claim that his federal constitutional privacy rights were violated. The threshold question for our analysis of that claim would be to determine which zone of privacy applicant's asserted privacy rights fell within. *Paul v. Davis,* 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976). If we were to conclude they fell within the decision-making or autonomy zone of privacy interests we would be required to apply the compelling state interest test. The privacy interests encompassed within this zone of privacy are only those which are fundamental or implicit in the concept of order liberty. *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). These are matters relating to marriage, procreation, contraception, family relationships and child rearing, and education. *Paul v. Davis; Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.,* 379 So.2d 633 (Fla. 1980). The other privacy interests described by the Supreme Court of the United States in *Whalen v. Roe,* 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1976), and *Nixon v. Administrator of General Services,* 433 U.S. 425, 97 S.Ct.

2777, 53 L.Ed.2d 867 (1977), involve one's interests in avoiding public disclosure of personal matters. In this area, a balancing test has been held to be the appropriate standard of review— comparing the interests served with the interests hindered. *See Plante v. Gonzalez*, 575 F.2d 1119 (5th Cir.1978).

Even applying the highest standard of review, we have already decided that the Board has demonstrated a compelling state interest and use of the least intrusive means to achieve that interest.

[10] We likewise find no merit to applicant's claim that the Board's challenged action violates his right to due process of law or that it violates his rights guaranteed by article I section 2 of the Florida Constitution, which provides in pertinent part that no person shall be deprived of any right because of physical handicap.

[11] Finally, applicant asserts that the refusal by the Board to process his application under the present facts violates his rights under section 90.503, Florida Statutes (1981). This statutory provision provides in pertinent part:

> (1) For purposes of this section:
>
> . . . .
>
> (c) A communication between psychotherapist and patient is "confidential" if it is not intended to be disclosed to third persons other than:
>
> . . . .
>
> (4) There is no privilege under this section:
>
> . . . .
>
> (c) For communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense . . . .

In response to applicant's reliance on the psychotherapist-patient privilege, we once again point out that it is applicant himself who placed his mental and emotional fitness as well as his moral and educational fitness in issue when he filed his applicant's questionnaire and affidavit, a preliminary step in seeking admission to practice law in Florida. Under section 90.503(4)(c), there is no privilege "[f]or communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense."

Accordingly, we approve the ruling of the Florida Board of Bar Examiners requiring applicant to answer item 28(b) and to file an unaltered authorization and release form. Until that time, the Board is fully warranted in not processing his application.

It is so ordered.

BOYD, OVERTON, McDONALD, EHRLICH and SHAW, JJ., concur.

ADKINS, J., dissents with an opinion.

ADKINS, Justice, dissenting.

As to the petitioner's claim predicated on the Florida Constitution, I agree with the majority that the state's interest in ensuring that only those fit to practice law are admitted to The Florida Bar is a compelling state interest. However, I must agree with the petitioner's assertion that the authorization and release form and item 28(b) are unnecessarily overbroad. I also agree with the majority's conclusion that mental fitness and emotional stability are essential to the ability to practice law in a manner not injurious to the public. However, I do not agree with the assertion that the means employed by the Board cannot

be narrowed without impinging on the Board's effectiveness in carrying out its responsibilities. As petitioner argues, it is difficult to conceive of information in which an individual has a greater legitimate expectation of privacy than medical records containing communications and other information between an applicant and a psychiatrist, psychologist, or counselor. Accordingly, information which is irrelevant to an applicant's ability to practice law in this state should not come within the scope of the Board's inquiry. An applicant's past treatment for some emotional disturbance, such as loss of a parent for instance, or treatment for amnesia which occurred, say, as a child ten or fifteen years ago surely is not relevant to the potential of that applicant to be a fit and worthy member of The Florida Bar today. At a minimum I feel there must be some time frame incorporated in question 28(b) and the authorization of the release of medical records relating to treatment for emotional disturbances, etc. In addition, I feel the form of the question seeking information about regular treatment for emotional disturbances, etc., could be phrased in terms which elicit information with regard to problems which, in the judgment of the medical community, impact on one's fitness to practice law. Such an approach would be consistent with the mandate of article I, section 23 of the Florida Constitution.

For these same reasons, I would hold that the Board's action also violates the applicant's federal constitutional right of privacy. I do not believe the least intrusive means have been employed and, if a balancing test were held to be the appropriate standard, the interests served by the question as it exists do not outweigh the privacy interests of the individual hindered.

APPLICATION TO FLORIDA BOARD OF BAR EXAMINERS (EXCERPT)

24. (a) Have you ever made application for a position the procurement of which required proof of good character, which application was denied? no If yes, Yes or No

then as to such application, state the name and address of the authority to whom it was addressed, date application was made, and the reasons for the denial.

(b) Have you ever held a license or certificate the procurement of which required proof of good character which license or certificate was revoked or suspended? no If yes, as to each such Yes or No

license or certificate, please state the date it was revoked or suspended, and the name and address of the issuing and revoking authority, and the reason for the revocation or suspension.

I have furnished a certified copy of the Order of Revocation or Suspension for each action listed above.

25. Are you or have you ever been addicted to or dependent upon the use of narcotics, drugs or intoxicating liquors or been accused of being addicted to or dependent upon said items? no If yes, please state the Yes or No

details, including dates.

26. Have you within the past ten years undergone treatment for or consulted any doctor about the use of drugs, narcotics or intoxicating liquors? no If yes, Yes or No

please state the approximate dates, details, circumstances, and names and addresses of the doctors so consulted.

I have directed each of the foregoing doctors to furnish directly to the Board any information requested by the Board in respect to any such treatment.

27. Have you ever been declared legally incompetent? no If yes, please give full details as to court, Yes or No
date and circumstances.

28. (a) Have you ever received diagnosis of amnesia, or any form of insanity, emotional disturbance, nervous or mental disorder? no If yes, please state Yes or No
the names and addresses of the psychologists, psychiatrists, or other medical practitioners who made such diagnosis.

(b) Have you ever received REGULAR treatment for amnesia, or any form of insanity, emotional disturbance, nervous or mental disorder? uncertain Yes or No
If yes, please state the names and addresses of the psychologists, psychiatrists, or other medical practitioners who treated you. (Regular treatment shall mean consultation with any such person more than two times within any 12 month period.)

[Answer] I would like a more specific definition of emotional disturbance and the nature of potentional inquiries before responding to this question.

I have directed each of the foregoing doctors and hospitals to furnish to the Board any information the Board may request with respect to any such treatment.

FLORIDA BOARD OF BAR EXAMINERS

Administrative Board of the Supreme Court of Florida

(Seal)

February 5, 1979

Ms. Mary Anne Robertson
4199 SW 67 Avenue, Apt. 2046
Davie, Florida 33314

Dear Ms. Robertson:

File No.: 22020-b

This will acknowledge receipt of your Applicant's Questionnaire and Affidavit with supporting documents.

The Board spent many hours deliberating on what constituted treatment under the wording of Item 28(b) and finally decided to define, for the purposes of the Board's application form, regular treatment as more than two consultations with a psychologist, psychiatrist or other medical practitioner within any twelve month period.

The Board makes inquiries relative to all information supplied by each applicant as needed to assure that it complies with its responsibilities as directed by the Supreme Court of Florida under Article II, Section 12 and Article IV, Section 19 of the Rules of the Supreme Court of Florida Relating to Admissions to the Bar. All matters are kept strictly confidential and are viewed only by those connected with the admissions process in Florida. Matters in the past range from what seems to have been job counseling to extensive hospitalization of an applicant.

Amendment forms are enclosed for your use in responding to Item 28(b). Processing of your application for registra-

tion cannot begin until such time as your Applicant's Questionnaire and Affidavit is completed.

Processing of your application will be administratively withheld for a period of ten days after which time your application will be returned to you if you do not respond to this notice.

Very truly yours,

/s/ John H. Moore
John H. Moore
Executive Director

JHM:vl:bao

Enclosures: Amendment forms
Copy of Item 28(b)

AMENDMENT TO APPLICATION TO FLORIDA BOARD OF BAR EXAMINERS DATED FEBRUARY 28, 1979 (EXCERPT)

I, (Name) Mary Anne Robertson (File Number) 22020-b, understand that my application, whether filed as a registrant or as an applicant for admission to The Florida Bar, is a continuing application and for this reason amend my application with the following additional facts and information which correctly and fully bring the previously filed Applicant's Questionnaire and Affidavit and Amendments to Application to a current status. This amendment applies to Item(s) 28(b), of my application as follows:

I decline to answer the question at this time because I feel it violates my constitutional right to privacy.

I would hope the remainder of my application could be processed as usual.

Please inform me of the consequences of my failure to respond. Thank you.

FLORIDA BOARD OF BAR EXAMINERS

Administrative Board of the Supreme Court of Florida

(Seal)

March 7, 1979

Ms. Mary Anne Robertson
4199 SW 67 Avenue, Apt. 204c
Davie, Florida 33314

Dear Ms. Robertson:

File No.: 22020-b

This will acknowledge receipt of your amendment dated February 28, 1979 relative to Item 28(b).

Processing of your application for registration cannot begin until the information requested under Item 28(b) of the Applicant's Questionnaire and Affidavit is received. If this information is not received on or before March 17, 1979, your application will be returned to you.

The Supreme Court of Florida recently ruled in a similar situation that an applicant must file the required information under Item 28 before processing of the application by the Board could continue.

Very truly yours,

/s/ John H. Moore
John H. Moore
Executive Director

JHM:ker:bao

Enclosure: Admendment forms

FLORIDA BOARD OF BAR EXAMINERS

Administrative Board of the Supreme Court of Florida

(Seal)

March 20, 1979

Ms. Mary Anne Robertson
4199 SW 67 Avenue, Apt. 204C
Davie, Florida 33314

Dear Ms. Robertson:

File No.: 22020-b

In that you have failed to respond to the Board's letter of March 7, 1979 within 10 days of the date of that letter, your application is herein returned.

Very truly yours,

/s/ John H. Moore
John H. Moore
Executive Director

JHM:vl

Enclosures: Form 1

ACKNOWLEDGEMENT OF APRIL 17, 1979 TELEPHONE CONVERSATION FROM JOHN H. MOORE, EXECUTIVE DIRECTOR OF FLORIDA BOARD OF BAR EXAMINERS, TO MARY ANNE ROBERTSON (EXCERPT)

I have personally checked the appropriate order concerning the recent Court decision to require an applicant to fully respond to the Applicant's Questionnaire and Affidavit question that concerns you and find that the wording does not clearly tell you what I have indicated. Since the Petition is not public record you will have to petition the Court if you wish to test the matter.

4199 S.W. 67th Avenue
Davie, Florida 33314

June 14, 1979

Mr. John H. Moore
Executive Director
Florida Board of Bar Examiners
Tallahassee, Florida 32301

Dear Mr. Moore:

In reference to your memorandum of April 17, 1979, I interpret it to mean that the statement in your letter of May 7, 1979 was incorrect; therefore it would seem that I don't have to answer item 28(b) nor petition the court concerning that item. Would you please clarify the matter for me.

In addition, would you please tell me if the court order concerning the petition of the applicant is confidential.

Thank you.

Sincerely yours,

/s/ Mary Anne Robertson

ACKNOWLEDGEMENT OF JUNE 14, 1979 LETTER FROM JOHN H. MOORE, EXECUTIVE DIRECTOR OF FLORIDA BOARD OF BAR EXAMINERS, TO MARY ANNE ROBERTSON (EXCERPT)

Please be advised that it will be necessary for you to either respond completely, to the best of your ability, to Item 28 or petition the Board. However, the Board has consistently held that you must complete the Application in its entirety.

4199 S. W. 67th Avenue
Davie, Florida 33314

August 4, 1979

Mr. John H. Moore
Executive Director
Florida Board of Bar Examiners
Tallahassee, Florida 32301

Dear Mr. Moore:

I am in receipt of your memorandum of June 14, 1979. I would appreciate it if you could review the correspondence between us concerning question 28(b) of the Application for the Florida Bar. It appears that my initial inquiries which I consider valid have never been directly addressed, and subsequent communications have not clarified the matter. The following is a brief outline of those communications:

January 15, 1979 - Under 28(b) of the application I failed to respond with a "yes" or "no" but requested "a more specific definition of emotional disturbance and the nature of potential inquiries before responding to the question."

February 5, 1979 - In response, your letter stated that "matters are kept strictly confidential . . . and have ranged from what seems to have been job counseling to extensive hospitalization of an applicant."

February 28, 1979 - I amended my application declining to answer the question "because I feel it violates my conconstitutional right to privacy" and requesting that you "inform me of the consequences of my failure to respond."

March 7, 1979 - In response, your letter stated that my application would be returned if the information requested under item 28(b) was not received on or before March

17, 1979. You also stated that "The Supreme Court of Florida recently ruled in a similar situation that an applicant must file the required information under item 28 before processing of the application by the Board could continue."

March 13, 1979 - I spoke with you on the telephone requesting the name of the case to which you had referred. You suggested that I get that information from the Supreme Court since you didn't have the name of the case.

March 20, 1979 - My application was returned to me with a letter stating that "you have failed to respond to the Board's letter of March 7, 1979 . . ."

April 17, 1979 - Since the Supreme Court of Florida could not locate the case without a case number, I telephoned your office for the information. Joan from your office told me that you would get an order from the Court to have the information released to me.

April 17, 1979 - A memorandum from you subsequent to my telephone call of April 17 stated that you have "checked the appropriate order concerning the recent court decision . . . and find that the wording does not clearly tell you what I have indicated. Since the Petition is not public record you will have to petition the *Court* if you wish to test the matter."

June 4, 1979 - I requested clarification of your memorandum of April 17, 1979, and asked whether the court order concerning the petition of the applicant was confidential.

June 14, 1979 - A memorandum from you stated: "Please be advised that it will be necessary for you to either respond completely, to the best of your ability, to Item 28 or petition the *Board*. However, the Board has consistently held that you must complete the application in its entirety."

In summary, would you please answer the following questions:

1) What is the definition of emotional disturbance?

2) What is the nature of potential inquiries?

3) Is the court order concerning the petition to which you referred confidential?

4) If I want to pursue the matter further should I petition the Court or the Board?

5) If the petition is to be directed to the Board, what is the procedure for filing the petition?

Thank you for your attention to this matter.

Sincerely yours,

Mary Anne Robertson

FLORIDA BOARD OF BAR EXAMINERS

Administrative Board of the Supreme Court of Florida

(Seal)

August 23, 1979

Ms. Mary Anne Robertson
4199 S.W. 67th Avenue, #204C
Davie, FL 33314

Dear Ms. Robertson:

File No. 22020-b

Your letter of August 4, 1979 has been received.

Please use your own best judgment as to whether or not any treatment you ever received fits under the provision of the Board's application question #28. Each applicant is asked to respond to the items on the application to the best of his or her ability.

A positive response to Item 28 would normally generate Board inquiry to the appropriate sources and the information generated considered in the whole person contract by the Board at the usual final evaluation of your application.

The applicant to whom previous reference has been made, made the request that any order delivered by the court refer to him as anonymous thus his case is confidential.

You may at your option petition either the Supreme Court of Florida or this Board. A petition to the Board may be in letter form of a simple letter and should be accompanied by a $15.00 fee pursuant to Rule V, Section 58 of the Rules Relating to Admission to The Florida Bar.

Very truly yours,

/s/ John H. Moore
John H. Moore
Executive Director

JHM:pg:gu

4199 S. W. 67th Avenue
Davie, Florida 33314

September 24, 1979

Florida Board of Bar Examiners
1300 East Park Avenue
Tallahassee, Florida 32301

Re: Petition for Waiver

Dear Sirs:

This letter is to request a waiver of the requirement to respond to question 28(b) of the application to the Bar. Additionally, I would like you to consider rewording the question or omitting it entirely from the application for the following reasons:

1) As the question is worded, the meaning of the term "emotional disturbance" is ambiguous. To enable myself to honestly answer the question, I requested a definition for "emotional disturbance" and was given a response which defined "treatment" and described other applicants' interpretation of the term.

2) The regulations implementing Section 503 and 504 of the Rehabilitation Act of 1973 prohibit broad pre-employment and pre-admissions inquiries concerning past mental illness. Although these regulations only apply to Federally Assisted Programs, they give evidence to the fact that this type of inquiry can constitute discrimination against the handicapped, which is prohibited by state and local statutes.

3) If the confidential communication of a patient to a psychiatrist was privileged by statute at the time it was made, then it should remain confidential unless a compell-

ing state interest would require disclosure. It does not seem reasonable that the acquiring of information about whether an individual has consulted a psychiatrist, a psychologist, or a medical practioner [sic] more than two times during a twelve month period is relevant to the State's interest in determining the fitness of applicants for admission to the Bar. The public interest in supporting effective treatment of mental illness and in protecting the rights of patients to privacy would appear to be more significant. Moreover, an individual should not be forced to waive the psychiatric/patient privilege by directing "each of the fore going [sic] doctors and hospitals to furnish to the Board any information the Board may request with respect to such treatment." (28b)

A random sampling of applications from other states reveals that no application has a question which is as broadly worded as that of Florida. (see enclosure). It is interesting to note that Mississippi and Virginia have no question regarding mental competency.

I object to being required to answer question 28(b) as a matter of principle. I would, therefore, appreciate a response to the issues raised in this letter as well as a response to the waiver request.

Sincerely yours,

/s/ Mary Anne Robertson
Mary Anne Robertson

encl.: Information on Applications from other States

FLORIDA BOARD OF BAR EXAMINERS

Administrative Board of the Supreme Court of Florida

(Seal)

October 24, 1979

Ms. Mary Anne Robertson
4199 SW 67 Avenue, Apt. 204 C
Davie, Florida 33314

Dear Ms. Robertson:

File No. 22020-b

This will advise you that this Board while in formal session during October 19, 1979 subsequent to consideration of your correspondence with the Board since February 1979 ruled that you must fully respond to Item 28(b) of the Florida Bar Application as stated to the best of your ability. Processing of your Application for Admission to The Florida Bar as a registrant cannot be initiated until such time as you respond to Item 28(b). A copy of Item 28(b) of the Florida Bar Application and amendment forms are enclosed for your convenience in this matter.

Very truly yours,

/s/ John H. Moore
John H. Moore
Executive Director

JHM:pg:bao

Enclosures: Item 28(b)
Amendment forms

CERTIFIED MAIL NO. 652436

RETURN RECEIPT REQUESTED

PAUL AND THOMSON
Attorneys at Law
1300 Southeast First National Bank Building
Miami, Florida 33131

December 12, 1980

CONFIDENTIAL

Mr. Alexander L. Hinson
121 North Madison Street
P.O. Box 550
Quincy, Florida 32351

Dear Mr. Hinson:

Confirming our telephone conversation, we represent Mary Anne Robertson, an applicant for the Florida Bar ("Applicant"). Applicant objects to responding to Question 28(b) of the application for The Florida Bar. Question 28(b) asks:

> "Have you ever received REGULAR treatment for amnesia, or any form of insanity, emotional disturbance, nervous or mental disorder?"

None of these terms is defined and while the Board of Bar Examiners may understand them, its understanding is nowhere explicated. Question 28(b) applies where there has been *no* diagnosis of the existence of any of these "illnesses". Where there has been an affirmative diagnosis of their existence, Question 28(a) applies.

The term "regular" is defined to mean "consultation with any [psychologist, psychiatrist, or other medical practitioner] more than two times within any 12 month period." If "regular treatment" has occurred, then all psychologists, psychiatrists and other medical practitioners who "treated"

the applicant must be named and the applicant must direct "each of the foregoing doctors and hospitals" to give the Board "any information" the Board may request with regard to any such treatment.

From this jumble of undefined and vague terms one may conclude that if an applicant has seen a psychologist or psychiatrist more than two times in a year, one presumptively has been "treated" for one of the "illnesses" named in Question 28(b). A "yes" answer to the question is, of course, an admission by the applicant that seeing a psychologist or psychiatrist three times in a year means the applicant had or has one of the named "illnesses". Parenthetically, it should be noted that a psychologist is not a medical doctor so the reference to "other medical practitioner" is confusing.

Assumedly, although not clearly, visiting any "other medical practitioner" three times in one year is not presumptive of the incidence of and treatment for one of the named "illnesses".

What is the purpose of securing the information to be supplied in answer to Question 28(b)? Presumably the Board is charging itself with judging the applicant's past mental state and projecting that past into a possible future response of the applicant to responsibilities as a lawyer. Such a task would overtask the expertise of psychologists, psychiatrists and other professionally trained medical practitioners, much less the Board. But the Board must answer the question of "purpose". The Board must evaluate what information in the general area of "mental health" will actually be of predictive value to the Board in passing on potential future action as a lawyer. If the predictive value is nil, then the information should not be sought. While some information in the "mental health" area might have predictive value, evaluation of questionnaires by other

states indicates only actual *commitment* would make such information possibly relevant. At minimum, a serious consideration of the question of "purpose" should mandate deletion of Question 28(b).

The Unreasonableness of Question 28

Certainly Question 28(b) is vague, overbroad, and reaches into the Applicant's most intimate and privileged personal information. Its vagueness is such an applicant must make a self-diagnosis of his/her mental state in order to determine whether past consultations, if any, with psychologists, psychiatrists, or "other medical practitioners" were for the purpose of treating the "illnesses" named in Question 28(b). Without a more definitive explanation of these medical terms it is irrational for a prospective member of the Bar to be subjected to such an unreasonable burden.

The overbreadth of Question 28(b) results in excessive and unnecessary governmental intrusion into an applicant's private life. If an applicant interprets the terms in a manner which results in a negative response to Question 28(b), that individual exposes him/herself to reevaluation at some future date by the Board or The Florida Bar with "20-20 hindsight". On the other hand, if an applicant opts to "play it safe" and respond to Question 28(b) in the affirmative for fear of such subsequent reevaluation, the applicant is forced to unconditionally waive all rights to preservation of the secrecy of his/her communications with the mental health advisor.

Furthermore, Question 28(b) is a conclusive presumption that whenever an applicant consults a psychologist, psychiatrist or "other medical practitioner" three times within a 12 month period he/she is conclusively presumed to be undergoing *regular* treatment. It is highly question-

able whether any such presumption is justified. The consultations could have taken place on three consecutive days to resolve a passing personal crisis or, on the other hand, could have been on a "once every fourth month" basis to discuss any personal or intimate matter which had arisen within the previous four months, i.e., analogous to any routine dental checkup or automobile tune-up. It is therefore unreasonable to establish a conclusive presumption that either transitory or periodic visits to a psychologist, psychiatrist, or "other medical practitioner" are *regular* visits for *regular* treatment. Such unreasonable *conclusive presumptions* are unconstitutional. *Bass v. General Development Corp.*, 374 So.2d 479 (Fla. 1979), *following Weinberger v. Salfi*, 422 U.S. 749 (1975); *Gallie v. Wainwright*, 362 So.2d 936 (Fla. 1978).

A further serious consequence of the vagueness and overbreadth of the Question is its "chilling" effect on potential applicants in need of psychological and psychiatric consultation. Even if we assume, *arguendo*, the propriety of *some* inquiry into possible "mental illness", the consequence of the "regular treatment" definition of Question 28(b) may well be to discourage persons in need of psychological or psychiatric consultation from seeking it. This is certainly an unfortunate, and equally certainly an unnecessary, result.

Practice in Other States

Florida is one of the few remaining states with an inquiry into an applicant's mental health of the overbroad and overreaching nature of Question 28(b). A review of applicant questionnaires for certification as a lawyer of 23 other states reveals that, unlike Florida, virtually all other state examiners have either deleted inquiries into an applicant's mental health, or have, at most, nar-

rowly restricted inquiries to cases where there had been a prior adjudication of mental incompetence or where the applicant had been voluntarily or involuntarily committed to a mental health institution. A summary of this review is attached as Schedule A.

Generally speaking, other states have strictly limited the scope of inquiry. Only two of the states reviewed (Georgia and North Carolina) do have questions similar to Florida's Question 28. Nevertheless, even these two states recognize the sensitivity of this area and have qualified the definition of "emotional disturbance" to aid a prospective applicant in understanding the term and in responding to the question, in each case making clear the question is not intended to reach isolated instances of consultation for conditions of emotional stress.

This other-state review exhibits the lack of need of the Board for Question 28(b).

Privileged Communications

Section 90.242(2) Florida Statutes (1979) provides:

> (2) Except as hereinafter provided, in civil and criminal cases, in proceedings preliminary thereto, and in legislative and administrative proceedings, a patient or his authorized representative, has a privilege to refuse to disclose, and to prevent a witness from disclosing communications between patient and psychiatrist, or between members of the patient's family and the psychiatrist, or records relating to diagnosis or treatment of the patient's mental condition.

Although this statutory privilege may not apply to actions of the Board and, arguably, the filing of an application is a waiver of the privilege if otherwise applicable (a position we would categorically deny), the statute does

reflect strong social values which should be respected. An applicant's medical history includes the most intimate, and thus, the most privileged, of all areas of personal information. Conversations between a patient and his psychologist, psychiatrist, or "other medical practitioner" with respect to the matters covered by Question 28(b) are certainly within the most confidential of such communications. But in Question 28(b) the Board compels the prospective Florida lawyer to unconditionally waive all rights relating to consultations without setting limits on the collection of data, the handling and analysis of records or other data collected, the storing and possible subsequent destruction of such records and data, or even providing a termination date for the uncontrolled waiver.

All privileged communications of the type exposed by an affirmative response to Question 28(b) should be carefully shielded. Strict control over the collection, use, storage and destruction of these confidential records is mandated if the privacy rights of the patient are to be safeguarded and if the records or other data are to be removed from the exclusive control of the applicant or his/her doctor, and instead placed within the grasp of governmental agencies (such as the Board) and the courts. The applicant is entitled to know, in advance of giving an affirmative response, of the existence and effectiveness of such restrictions.

The Florida Constitution

In November an amendment to Article I of the Florida Constitution was adopted providing as follows:

> Section 23. *Right of privacy* - Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein.

The right to privacy thereby included in the Florida Constitution is an interest already protected to some degree by various provisions of the federal Constitution, including the First, Third, Fourth, Fifth, Eighth and Fourteenth Amendments.

The mandate of new Article I, Section 23 of the Florida Constitution is absolute. There is no indication the federal two-tier model of "rational basis" and "strict scrutiny" is to be applied. The text of this provision is derived from the Constitutional Revision Commission's proposals in 1978. Members of the Florida Ethics, Privacy and Elections Committee of that Commission concluded the federal "compelling interest standard" was too weak and limitations on the privacy right for compelling state interests were rejected. In addition, attempts to limit the privacy right to "unwarranted" or "unreasonable" governmental intrusions, rather than all intrusions, were rejected for fear the insertion of such modifiers would cause courts to apply the federal "rational basis" test. Cope, *To Be Let Alone: Florida's Proposed Right of Privacy,* 6 FLA. ST. L. REV., 673, 725, 746 (1978), *citing,* Fla. C.R.C. Ethics, Privacy and Elections Committee Minutes, 3 (Oct. 14, 1977).

The Board's questionnaire, drafted prior to the enactment of Florida's new constitutional "right to be let alone," must be reexamined and reevaluated in light of this contemporary development. Inquiries into privileged mental health records are constitutionally invalid and cannot continue.

Application of the Federal Constitutional Standard

Even if one were to assume Florida courts might contradict the drafters' intent and restrict the application of the new Florida Constitutional amendment, the Board, as

an agency of government, must, as a result of potential serious infringement on an applicant's fundamental right of privacy under the federal Constitution, prove the existence of an overriding and compelling state interest in limitless review of privileged records. We submit the Board cannot meet this burden of proof where there has been no professional diagnosis of the named "illness" and where the applicant must self-define the terms and the purpose for consultations.

Aside from proving the intrusion accomplishes a compelling state interest, the Board must additionally show that in conducting its investigations it has used the least intrusive means of doing so. The collection of this highly sensitive information is not the least intrusive means when *all* privileged medical records, on three consultations within a 12 month period, become reviewable without restriction.

Mental Health Today

The fields of psychology and psychiatry present the most difficult problems of confidentiality. Inquiries in this area, if any, must be strictly limited to matters of direct and immediate concern. The stigma which society has historically attached to "mental illness" as compared with the ills of the body necessitates strict care. Psychological and psychiatric treatment is impossible without trust. Such trust is often not necessary with the ills of the body; a surgeon can successfully set a broken limb even if the patient does not have total confidence in the surgeon's integrity. However, a psychotherapist often cannot aid his patient without assurance that the patient's most intimate personal secrets will remain undisclosed. Question 28(b) comes from an age where any consultation with mental health practitioners was automatically indicative of

a patient's presumed mental incapacity. The question presents a serious obstacle to the nationwide trend of seeking to improve mental health by encouraging counseling whenever deemed necessary, without fear of subsequent disclosure.

The Board of Bar Examiners must carefully reevaluate the questions on the applicant's questionaire regarding the applicant's mental health history. Question 28(b) is merely the most egregious. The Board must assure prospective applicants their constitutional rights, including their right of privacy, will be strictly safeguarded, especially under circumstances where the applicant has never been professionally diagnosed as suffering from anything.

Sincerely,

/s/ Parker D. Thomson
Parker D. Thomson

PDT:bjb

cc: Mr. John H. Moore
Ms. Mary Anne Robertson

SCHEDULE A

SUMMARY OF APPLICANT QUESTIONNAIRES: *Based on a review of applications from 23 states.*

1. Seven have no questions at all regarding mental competency or treatment.

2. Sixteen have no questions on treatment.

3. Fifteen have questions relating to prior adjudication of incompetence and/or commitment for mental illness.

4. Georgia and North Carolina have a question worded like Florida's Question 28(b). However, both states qualify the definition of emotional disturbance.

QUESTIONS ADDRESSING MENTAL HEALTH IN APPLICANT QUESTIONNAIRES FROM 23 STATES

A. *Alabama*:

1. Question 11-(a) (b) (c): Commitment as a voluntary patient and explanation.

B. *Arizona*:

1. Question 13(a): Adjudged incompetent; or treated or confined for mental or emotional disorders.

C. *Arkansas*:

1. Question 9(f): "Now suffering or ever suffered from or been treated for any mental illnesses."

D. *Idaho*: No question.

E. *Kansas*: No question.

F. *Kentucky*: No question.

G. *Maryland*:

1. "Have you within the past 10 years ever been a voluntary patient in any sanitarium, hospital or mental institution for the treatment of mental illness? If so, attach statement giving full explanation including name and address of doctor and institution."

"If so, attach statement giving full explanation including name and address of doctor and institution."

H. *Mississippi*: No question.

I. *Missouri*:

1. "Declared incompetent because of mental illness or condition, or committed, confined or treated in any institution for mental illness."

J. *Nebraska*:

1. "Have you ever been adjudicated an incompetent person, an insane person or a lunatic by any court? (yes or no)."
"Full details."

K. *New Hampshire*: No question.

L. *New Mexico*:

1. "Have you ever been adjudicated an incompetent person, an insane person or a lunatic by any Court?"
"Have you ever been a voluntary patient in any sanitarium, hospital or mental institution for the treatment of a mental illness? ..... If so, attach statement giving full explanation, including name and address of doctor and institution."

M. *North Carolina*:

1. "Have you ever been declared legally incompetent? ..... If so, please give full details as to Court, date, and circumstances."

"I have directed each of the foregoing doctors and hospitals to furnish to the Board any information the Board may request with respect to any such treatment."

a. Question with the same wording as Florida's 28(a) and (b) - combines treatment and diagnosis into one question.

b. Question adds in parenthesis: "This question is not intended to apply to isolated instances of consultation for conditions of emotional stress."

N. *North Dakota*:

1. "Have you ever been treated or confirmed for mental or emotional disorders, adjudged incompetent or insane by any court or declared a ward of the state. If so, give details."

O. *Ohio*:

1. "State whether you have been, or presently are:

(c) treated for mental illness;

(d) adjudged incompetent by any court;

(e) committed to or confined to any mental or correctional institution."

"If you ranswer to any section of the above question is "Yes" set forth the facts in detail . . ."

P. *Oklahoma*:

1. Question 8(d)(e)(f):

(d) "Have you ever been a patient of a mental institution or other similar hospital or institution? ..... (Yes or No)."

(e) "Have you ever been afflicted with or received treatment for amnesia, or any form of insanity or mental disorder, or suffered from any mental illness? ..... (Yes or No)."

(f) "Have you ever been under guardianship or declared a ward of the Court, other than a minor, or declared incompetent? ..... (Yes or No.)"

"Do you give your consent for the doctor who treated you to furnish to the Board of Bar Examiners any information requested by the Board in respect to such treatment? ..... (Yes or No)."

"Give details . . ."

Q. *Rhode Island*:

1. "Have you ever been adjudicated an incompetent person, or insane person or a lunatic by any Court?"

R. *South Dakota*:

1. "Have you ever been declared a ward of any Court, or adjudged an incompetent, . . . or have you ever been committed to any institution?"

S. *Tennessee*:

1. "Have you ever been adjudicated an incompetent person, an insane person or a lunatic by any Court. ....."

T. *Virginia*: No Question.

U. *Washington*: No Question.

V. *West Virginia*:

1. "Have you ever been a voluntary patient in any sanitarium, hospital or mental institution for the treatment of a mental illness. ..... If so, attach statement giving full explanation, including name and address of doctor and institution."

W. *Georgia*:

1. Question same as Florida's 28(b) with addition of:

"(This question is not intended to apply to isolated instances of consultations for conditions of emotional stress.)"

"I have directed each of the foregoing doctors and hospitals to furnish the Board any information the Board may request with respect to such treatment."

FLORIDA BOARD OF BAR EXAMINERS

Administrative Board of the Supreme Court of Florida

(Seal)

22 December 1980

Parker D. Thomson, Esq.
1300 Southeast First National Bank Building
Miami, Florida 33131

RE: Applicant Mary Anne Robertson

Dear Mr. Thomson:

I have received and reviewed your correspondence of December 12, 1980 regarding the referenced applicant. Since the objections you raise to question 28(b) and related questions on our application form are rather extensive, I have asked Mr. John Moore, our Executive Director, to forward a copy of your correspondence to Mr. Graham Carothers, the Board's attorney, for further study and evaluation. I have also asked Mr. Moore to agenda this particular item for consideration by the Board at its next "policy session" which will be during the Board's February 6-7, 1981 meeting.

Sincerely,

/s/ Alexander L. Hinson
Alexander L. Hinson
Chairman

ALH:kc

cc: John H. Moore, Executive Director
C. Graham Carothers, Board Attorney

FLORIDA BOARD OF BAR EXAMINERS

Administrative Board of the Supreme Court of Florida

(Seal)

February 16, 1981

Parker D. Thomson, Esquire
1300 SE 1st National Bank Building
Miami, Florida 33131

Dear Mr. Thomson:

In Re: *Mary Anne Robertson*
a/k/a: *Sister Charles Ellen Robertson*
File No.: *22020-b*

This will advise you that the Board while in formal session during February 6-7, 1981 reviewed your letter relative to the above-named applicant's objections to Item 28(b) of the Applicant's Questionnaire and Affidavit. Please be advised that the Board greatly appreciates your interest and input and has designated a special committee to review the entire application in view of your concerns and consideration of the recently enacted Right to Privacy amendment to the Florida Constitution.

Until such time as a decision is made which requires any part of the Applicant's Questionnaire and Affidavit to be revised your client will be required to complete all portions of the questionnaire as accurately and candidly as possible.

Please understand this Board will contact all doctors who are reported under Item 28(a) or (b) and in the majority of cases the Board's inquiry is satisfied at that point. It is hoped that this information will help relieve your client of any unnecessary fears of the system.

Please do not hesitate to write if you have further questions.

Very truly yours,

/s/ John H. Moore
John H. Moore
Executive Director

JHM:yc:vc

PAUL & THOMSON
Attorneys at Law
1300 Southeast First National Bank Building
Miami, Florida 33131

March 12, 1981

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. John H. Moore
Executive Director
Florida Board of Bar Examiners
1300 East Park Avenue
Tallahassee, Florida 32301

Application of Mary Anne Robertson
Your File No. 22020(b)

Dear Mr. Moore:

We have received your letter dated February 16, 1981 wherein you informed us that the Florida Board of Bar Examiners (the "Board"), at the formal policy session held on February 6-7, 1981 had decided to appoint a special committee to review the Applicant's Questionnaire and Affidavit (the "Application") in light of our concerns and objections as expressed in our letter to the Board dated January 16, 1981 on behalf of our client, Mary Anne Robertson.

We have advised Ms. Robertson to complete each and every portion of the Application other than Item 28(b), pending a final decision by the special committee, and her application as so prepared is enclosed. As counsel for Ms. Robertson we request the Board process the enclosed Application forthwith, with completion of Item

28(b) being dependent on the special committee's action. Please confirm that the Board is so doing.

Sincerely,

/s/ Parker Thomson

PDT:rew

cc: Mr. Alexander Hinson
Ms. Mary Anne Robertson

PAUL & THOMSON
Attorneys at Law
1300 Southeast First National Bank Building
Miami, Florida 33131

April 17, 1981

Mr. John H. Moore
Executive Director
Florida Board of Bar Examiners
1300 East Park Avenue
Tallahassee, Florida 32301

Application of Mary Anne Robertson
Your File No. 22020(b)

Dear Mr. Moore:

We are awaiting formal written notification of the Board's final administrative ruling denying our client's request that it process her application pending action of the "special committee" formed to review the Board's application requirements in light of the new Privacy Amendment to the Florida Constitution.

We hereby serve notice on the Board that upon receipt of the Board's formal denial of our client's request we shall file an appropriate Petition with the Florida Supreme Court appealing this decision pursuant to Article IV, Section 20(b) of the Rules of the Supreme Court Relating to the Admissions to the Bar. It is unfortunate the Board attaches greater weight to potential administrative inconvenience than to the probable deprivation of our client's fundamental privacy rights that coerced compliance with the application requirement would cause.

To avoid this unhappy result, our client will stipulate that she will complete her answer to question 28(b) in

accordance with the existing rules should the constitutionality of the Rule be upheld by a final appellate court. This stipulation is conditioned only upon the reciprocal stipulation by the Board that it process the application during the pendency of the litigation.

Please confirm that this stipulation is acceptable to the Board.

Sincerely,

PDT:cbw

cc: Mr. Alexander L. Hinson
Ms. Mary Anne Robertson

FLORIDA BOARD OF BAR EXAMINERS

Administrative Board of the Supreme Court of Florida

(Seal)

April 20, 1981

Parker D. Thomson, Esquire
1300 SE 1st National Bank Building
Miami, FL 33131

Dear Mr. Thomson:

In Re.: *Mary Anne Robertson*
File No.: *22020-b*

This will acknowledge your letter of February 12, 1981, your recent telephone call relative to the application of the above-named person and a direct call from Ms. Robertson. As stated by phone, the Board's position was properly outlined by letter dated February 16, 1981. The Board fully understands your client's position; however, there is no indication that the Board's special committee will develop recommendations over the short term and, in fact, it would appear that the Board will need judicial construction for guidance in order to make such recommendation.

Your client may amend Item 28(b) at this time and the normal background investigation will begin at once. In the meantime, the file will be held out of processing.

Yours truly,

/s/ Alexander L. Hinson
Alexander L. Hinson
Chairman

ALH:bao

cc: Registrant Robertson via Attorney Thomson

COMMITTEE ON GOVERNMENTAL OPERATIONS

Bill #: CS/HJR 387
Sponsor(s): Reps. Mills, Kiser & Moffitt
Relating To: Constitutional Amendment relating to a right of privacy

Other Committee Reference: None
Similar/Companion Bills:

February 7, 1980

I. SUMMARY

A. Present Situation

Presently, in Florida, there is no general state constitutional right of privacy.

B. Probable Effects of Proposed Changes

Passage of this resolution would submit for referandum, a constitutional amendment creating § 23, Art. I, State Constitution.

Section 23, Article I, State Constitution, would guarantee every natural person freedom from governmental intrusion into his private life except as otherwise provided in the Constitution. This section does not limit the public's right of access to public records and meetings as provided by law.

II. PRIVATE SECTOR/STATE/LOCAL FISCAL IMPACT

Not determinable at this time.

III. COMMENTS

According to the United States Supreme Court, "the protection of a persons *general* right to privacy—his right to be let alone by other people

—is, like the protection of his property and his very life, left largely up to the law of the individual states." *Kass v. U.S.*, 389 U.S. 347, 350-351 (1967). However, the Florida Supreme Court, in *Laird v. State*, 342 So. 2d 962 (Fla. 1977), held that it was clear that Florida has no general state constitutional right of privacy.

Additionally, the Florida Supreme Court overturned a First District Court of Appeal decision recognizing constitutional "Privacy of Personhood" and concluded that "under the federal constitution a person's disclosural privacy is not as broad as was found by the district court and that under our state constitution no broader right is granted." *Shevin v. Harless, Schaffer, Reid and Associates, Inc.*, Case Nos. 54,405 and 54,406, filed January 17, 1980.

At least ten (10) states have adopted express language in their constitutions to protect privacy, including Florida whose 1969 constitutional provision also protects "private communications" from unreasonable searches and seizures. Three (3) of these states have adopted a free-standing constitutional state right-of-privacy similar but not identical to the one being examined.

A similar amendment was agreed upon by the Constitution Revision Commission and included in the 1978 constitutional revision "package" for referendum.

IV. AMENDMENTS

None

PREPARED BY: Tina M. Williams

STAFF DIRECTOR: Ron

Executive Reorganization Subcommittee of Governmental Operations February 12, 1980

Chairman Mills: Next we have HJR 387 which has as its cosponsors Representatives Mills, Moffitt and Kiser. Who could disagree with a bill cosponsored by those people? What we wanted to do today since this has a relationship to the Privacy Bill and I want to have Tina explain the staff work she's done on it and have some questions on this today and again respond to this next time around because although it's a very simple one-line item, it has a very complex impact. So, Tina, if you would explain the massive research which you've done—it's really quite a bit.

Tina Williams: This bill, if it passes—Passage of this resolution would submit for referendum a constitutional amendment creating Section 23, Article I of State Constitution. This Section 23, if created, would guarantee to every natural person freedom from unwarranted governmental intrusion into his private life. In researching this bill, I noted that at least ten states directly have adopted express language in their constitutions to protect privacy. In these ten Florida is included because a 1968 constitutional provision protects private communications. Three states have adopted a free standing constitutional right of privacy similar but not identical to the one being examined. In the 1968 constitution revision packet, there was also a similar proposal to create a Section 23 to the State Constitution guaranteeing every natural person freedom from unwarranted governmental intrusion. Recent Supreme Court cases have indicated that our Supreme Court does not recognize a right of personhood as guaranteed in the Constitution.

Chairman Mills: Personhood isn't even in Webster's Dictionary.

Tina: Well, that's language from the case. I would like to answer questions now if I could.

Mills: Let me make a couple of comments on this. There is one difference from the Privacy Provision which was passed by the Constitution Revision Commission. Two? Well, one that was particularly of concern to some people on the Revision Commission was the word "unwarranted." It said free from governmental intrusion into private life, and there was some concern on the part of some people that this would do away with everything that the government does in terms of regulation which therefore could create a real problem. Therefore the word "unwarranted" was added to support what people thought the court would probably do anyway. The courts in reviewing this would reasonably assess what intrusion would be. Also the fact that the existence of those Florida Supreme Court cases supports the fact that this would add something that doesn't exist now and I think perhaps the Supreme Court would be happy to have that option. Anyway, there's another distinction?

Tina: The reasoning, well the Constitution Revision Commission's reasoning behind the right of privacy is to put it on an equal basis with the Sunshine Amendment or with the Open Government Amendment in the Constitution—to make it a fundamental right and just a note that the three states that have adopted free standing right to privacy in their constitutions have rarely ventured beyond the federal protective right of privacy in that state rights having to do with electronic surveillance, policing, taxing, they have not be affected at all.

Mills: Well, if there are no more questions on that we'll update that next . . .

Bill Conway: Assuming this becomes part of the Constitution, then if you or I had our privacy violated, then wouldn't we go to court? Couldn't we do it with or without the amendment?

Mills: We could go to court today but there is no constitutional right. One of the things generated . . .

Conway: I'm not opposed to it.

Mills: We could go to court. The problem that this attempts to respond to is that in fact Florida in drawing some boundaries has said there is no right to privacy. This is because the line of cases which made it difficult for them to do something else. And the fact that there is a federal right of privacy doesn't really help when you're relating to state government. This is a protection of the individual against state government. It doesn't have anything to do with private enterprise.

Conway: Why don't we vote it out today?

Mills: What a great guy! No, wait til you see how fast we pass them next time. Well, there were one or two issues that some of the newspaper people had that related to this, and that is as it concerns financial disclosure, that we wanted to make sure we had covered. And that's the only issue.

Financial disclosure?

Mills: Don't worry about it. Everything will be okay. Well, what I'd like to do it take that up as a committee bill, as a committee substitute so that we can play with it—the staff. So Mr. Nergard moves that and . . . We'll take that up as a committee bill, a committee substitute so that we can play with it in the interim. If there's no objection, it passes. Okay.

Executive Reorganization Subcommittee of Governmental Operations March 11, 1980

Chairman Mills: As long as we have some people here to testify on this other matter, on HJR 387, which also relates to the right of privacy, a constitutional amendment, maybe before we take any witnesses on that—Tina, is there any update you have on that? Does everyone have in their package the current version of that?

Tina: There has been a little change in the wording of this bill. If you'll notice on line 16, after "private life" we've added "except as otherwise provided herein." That phrase was included in the proposal submitted by the Constitution Revision Commission also. Unless you have any other questions.

Lee Moffitt: What is "otherwise provided herein". That might cause a problem.

: That's so you don't have any conflict with the Constitution, right?

(unintelligible)

Mills: Professor Dore? A law professor from Florida State University, which is a very good law school also.

Pat Dore: Thank you, Mr. Chairman. Actually I think I'm here representing myself rather than the law school. And I'll try to stay out of that process. I thank the chairman for inviting me to come over. As some of you may know, I spent some time working with the Florida Constitution Revision Commission and was the staff for the Ethics, Privacy and Elections Committee of that Commission which was responsible for developing the Commission's proposal on the right

to be let alone. The proposal that you have before you looks very much like the proposal recommended by the Revision Commission with one exception, and that is the introduction of the word "unwarranted" before "governmental intrusion." Mr. Moffitt, if I might address your question at the outset, and that is the meaning for the "except as otherwise provided herein" language. That was initially submitted, or instituted, on the Commission floor at the behest of Commissioner Jack Matthews, his concern being that even though we were in a revision process and the whole document was before the Commission, there was a possibility that a revision coming later in time into the Constitution may be viewed as undercutting provisions already in the Constitution. The Commission was particularly concerned about the Sunshine Amendment, and so the language was put in specifically to indicate that there was no intention to undercut the Sunshine Amendment.

* * *

Dore: Assuming two natural persons. The phrase really has historical significance. The right to be let alone as opposed to be left alone which may in 1980 America seem more grammatically correct. The right to be let alone was first coined by Judge Thomas Cooley in his treatise on torts in 1880, and it was then picked up in a very important law review article written by Warren and Brandeis in 1890 which was the foundation for later recognition of the tort of invasion of privacy. So that the right to be let alone goes back and picks up the first formulation by Cooley. As it's stated at that point it would appear that there is an absolute right to be free from all intrusion, governmental as well as private, but the following phrase should be viewed as a limitation on the right

that has been recognized. That is, the right to be let alone and free from unwarranted governmental intrusion. That phrase clearly limits the intrusion to governmental intrusion and in this proposal limits it to unwarranted governmental intrusion. I feel compelled at this point to say that I think there will be some problems created by use of that word for this reason, and I've already discussed this with the chairman and he knows how I felt about the use of unwarranted during revision. My concern is this: There is a relatively well developed, well published history of the evolution of this process through the revision process. And throughout the debate on the use of the word unwarranted or not stemmed around the importance to be attached to the right to be let alone. That is, those persons who felt that the right to be let alone, to be treated as a fundamental right similar to the right of freedom of speech, freedom of religion, freedom of association, argued that to put unwarranted before intrusion would be to suggest that the right was not as important. On the other hand, those persons who wanted unwarranted to be there were not indicating any discomfort with the right to be let alone. Rather their concern was that the way it was stated is that there is a right to be let alone and free from intrusion would mean that government couldn't do anything to an individual without running into this right. So they were suggesting that some limitation ought to be in place. I appreciate what it is that the chairman has in mind in using "unwarranted" but my concern is that a record be made and it start to be made that if your concern is with establishing essentially a signal to the court, how it is that it should balance the right to be let alone against competing govern-

mental interest, then that needs to be done because coming as its coming on the heels of the revision suggests something a little bit different and since I last talked with you, Mr. Chairman, I would add another point, if I might. And that is in the Supreme Court's recent decision in *Byron Harless,* it somehow rewrote the language in Article I, §12, dealing with search and seizure. Article I, §12 speaks of people's right to be free from unreasonable search and seizure. Twice in its *Byron Harless* opinion, the Supreme Court said "unwarranted" search and seizure. They connected it both times to Article I, §12, nonetheless they misquoted it which again gives me a little bit of concern.

Mills: Are there any comments? I think it might be appropriate if we made something of a record on this.

Nergard: (uninteiligible—something about unwarranted)

Mills: Mr. Moffitt, do you want to talk about that or do you want me to talk about that?

Moffitt: Ron just whispered that same kind of question over to me. I feel comfortable in letting the courts balance what needs to be balanced based upon specific fact situations which may develop arising under this particular proposed section to the Constitution. If we take out the word "unwarranted" for example and delete what may be offered as an amendment "except as otherwise provided herein" we are not leaving the flexibility that I think ought to exist in a constitutional document. The courts have traditionally taken language and have interpreted the language to apply to different fact situations and circumstances as they might arise. We can sit here and brainstorm about a million practical examples and probably wouldn't hit

them all. And you need, I think, an abundance of being careful to leave words like "unwarranted" in there to allow the flexibility to deal with the question when it comes up because there are instances such as search and seizure, for example, where I believe that is a warranted governmental intrusion if certain safeguards are met before a search and seizure is completed. If we take that out, I'm concerned about what kind of monster we might be creating.

Dore: May I offer an observation, Mr. Moffitt?

Mills: Let me inject an observation so you can observe both of them. In my understanding of what we were doing when we put in "unwarranted" we are promoting a balancing test to say that there are some governmental intrusions that are not unconstitutional. That's all. And that the word "unwarranted" is a word through which the court will define which of those intrusions are not constitutional. If I recall in the Constitution revision process, the word "unwarranted" was offered by Governor Collins as an amendment and it failed in subcommittee like 4-2 or something.

Dore: That's not entirely fair. It failed at least 6 times during the process. Governor Collins was very . . .

Mills: It failed at least six times during the process. But I believe his concern was the same as we are expressing and not that we are trying to say the right is less fundamental or less important. At least I think that I wanted to express that.

Dore: If I might, first of all, Mr. Moffitt, I think the closest analogy to what we are talking about is the right to be let alone and free from government intrusion. Unmodified it's found in the First Amendment of the United States Constitution and a similar provi-

sion in Article I, §4 of the Florida Constitution. The First Amendment is Congress shall make no law abridging the freedom of speech or press. It is stated in the most absolute terms that, I think, the drafters or even modern people would know how to state it and yet it has never been construed as meaning what it says. The court has always recognized that there are no constitutional absolutes. That has similarly been the case with the Florida Supreme Court's construction of Article I, §4 which says every person may speak, write and publish his sentiments on all subjects. The courts have always recognized that there must be a balancing of private rights and government responsibilities. The question when you come into balancing, however, is what weight is to be attached to the right, and at least with respect to the First Amendment, it has been referred to as the preferred amendment, not only because of its position, Mr. Moffitt, but also because of the terms in which it is stated. It has, therefore, been understood as the most important, most fundamental, most basic of our rights and government in all instances must meet a higher burden in order to justify infringement of that right. I would suggest to you that that is precisely what the Revision Commission was trying to do with the right to be let alone and that by putting "unwarranted" in, you suggest, number one, the right is not as important; number two, I don't think, Mr. Mills, that you add anything necessarily to the balancing test. There will be balancing. There will be balancing. By saying "unwarranted government intrusion" if I might quote from former Commissioner Dexter Douglass, he says that's a weasel word. What you're doing is giving the court an opportunity to not necessarily be as explicit as they might want to be in terms of the analysis.

Mills: Well, I have two amendments here, from Representative Richmond which raises these issues. So I guess we might as well go ahead and consider those and find out the sentiment of the subcommittee. The first one was on page one, line 16: strike "except as otherwise provided herein."

Richmond: Well, I would just like to go ahead and offer this to have a showdown between the right of privacy and what's called a misnomer as you might say, the Sunshine Amendment because I'll admit the Sunshine Amendment does provide three great things. It gives my secretaries more work; provides for more warehouse space in Tallahassee; and cheap gossip for the newspapers. But other than that, I bet you Dot Glisson out there can tell you not 100 requests from throughout the entire state have been made for our financial disclosure statements. And I think it's just a useless amendment and I'd just like to, let's go ahead rather than clutter up this potentially good constitutional amendment, let's just get that out of there.

Mills: Other discussion?

Moffitt: I move to lay the amendment on the table.

: Bleeding heart liberal.

Mills: Mr. Moffit moves to lay the amendment on the table. This gives Mr. Richmond . . .

Richmond: Quite very clear cut—it's my annual run on the Sunshine Amendment.

Mills: There's no other argument. All those in favor of the amendment's lay, please signify by saying aye. Aye. Opposed. No. It's laid. Mr. Richmond's next amendment, which looks like it's joined by another amendment, or at least joined in sentiment. On page one, line 15: strike "unwarranted".

Richmond: I feel, and I don't know that she ever really hit the way I feel on it, but I feel the word "unwarranted" leaves the amendment to almost a nothing amendment. I think if you're going to have the right of privacy amendments, it's going to be construed by the Supreme Court and it's going to be balanced as you are trying to get without that word. But I believe if you put "unwarranted" in there that it's going to get the slight end of the balance. And therefore, if you want a true right of privacy amendment, you need to take that word out.

Mills: Mr. Conway.

Conway: Mr. Chairman, I would like to ask if there aren't really times where there is warranted government intrusion.

: Certainly search and seizure is one of those areas and you're going to have that balance and you're not going to change the search and seizure law, Bill, I don't think by virtue of this. And as I say taking out "unwarranted" you're going to have the supreme court balance this amendment along side of the other constitutional provisions that we have. But I think when you put unwarranted in there you have a chance of weakening this amendment, Section 23, to such a degree that I don't think you really end up with much and I think what you really want is a good amendment.

HJR 387 - House Floor Debate 5/5/80

READING OF THE BILL

Rep. Mills: This creates a constitutional right to privacy or actually gives the right to the people to vote on that. I think an important thing to note on this is a recent Harris Poll which indicates that 65% of the people polled believe the right of privacy should be a fundamental right just as life, liberty and the pursuit of happiness. I don't think there's any amendments on this and I think this gives us an opportunity to put our money where our mouth is and say that big government (he's interrupted here).

Rep. Healey: Is this similar to or identical to the constitutional revision amendment which was offered back in November of 1978?

Rep. Mills: It is somewhat different to the extent that it has a provision in there which says unless otherwise provided herein which protects the search and seizure provisions and has a provision dealing with records and open meetings to protect us.

BILL CARRIED OVER TO THIRD READING. It is was read for the third time on 5/6/80 and passed 98 Yeas and 4 Nays.

SJR 935

SENATE RULES COMMITTEE - 5/6/80

Sen. Gordon: I need to offer some amendments to get this whole thing in front of us. It's a simple constitutional amendment which was suggested debate in the Constitutional Revision Commission, I'm sure that some of those members who are here will be able to add to this discussion. But it simply adds a declaration of right, the right of privacy in the state constitution saying that every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein and after the word "herein" we want to insert "this section shall not be construed to limit the public's right of access to public records in meetings as provided by law". Since that...

Sen. Barron: To the amendment on Page 1, line 17 following the language of the bill that the Senator just read add "this section shall not be construed to limit the public's right to access to public records in meetings as provided by law." Discussion on the amendment. Anyone desire to oppose it. . . anyone desire to speak.

Sen. Dunn: We seem to be going so fast her [sic], I want to ask a question. You know, this thing seems in its plain language to be a very absolute statement of constitutional law. Now, I think at least we ought to ask the sponsor of the proposal what his view is with re-

gard to the absolute construction. That says every natural person has a right to be let alone and *free* from governmental intrusions except as provided by the constitution. You know you can read that and not saying I will not ultimately support something personally. If you can read that to say unless it is specifically authorized in the constitution such as the unreasonable search and seizure. All searches and seizures are not prohibited only unreasonable ones are. So, a right to privacy is really a right that is protected by that same constitutional restriction but that is not anywhere near as absolute as this is. Whereas we may be saying that *no* searches and seizures are constitutionally permitted because they would constitute an intrusion into the private life of a person.

Sen. Barron: Senator, we are on the amendment, and maybe you want to discuss them both together.

Sen. Gordon: Senator, my purpose in offering it now and ask that you pass it is so that the amendment would not be. . . I mean we'd get that exception understood. Then I'll be glad to discuss. . .

Sen. Dunn: I have no objection to the amendment.

Sen. Barron: Let's adopt the amendment and then we'll get on to the resolution and we have Pat Dore here who is an expert.

Sen. Gordon: Yes, I would like to have a constitutional expert respond to Senator Dunn's questions.

Sen. Barron: Pat Dore has been cited for the unauthorized practice of law in the State of Florida, been before the Ethics Commission, along with me, we know what it's all about, she is an authority on the constitution.

Pat Dore: Well, Senator, I am not a member of the Florida Bar and I'm not holding myself out as a member of the Florida Bar today. Senator Dunn, with respect to your question, that was an issue that was debated at great length and I will note at this point that without the amendment, the language is precisely the language that was approved by the Constitutional Revision Commission and so we have the background and that history developed. During the course of the debate during the Revision, the primary question was how important a right was the right to be let alone. Was it a right that was considered of fundamental importance as the right of free speech and freedom of religion and free press. Or is it a right of less importance. The commission took the position that the right way to signal, send that figment to the courts, was to put the provision, to put the language in essentially absolute terms recognizing and understanding that there are no constitutional absolutes. The idea was understanding that the courts will engage in a balancing process weighing the competing governmental interests against the intrusion on an individual's privacy. The importance of stating the right in absolute terms was that when

the court put the right in the balance, that it would lean as a weighty fundamental important right which has the effect of increasing the burden of the government in justifying any intrusion.

Sen. Dunn: Could you tell us whether there are any other states which have language identical or substantially identical to the language which is here in this proposal.

Pat Dore: Senator, there are three states now that have so-called free standing rights of privacy, that is a right of privacy that is not connected with another provision in the constitution. Most of them have a provision in the search and seizure section and that has caused all kinds of problems because in two respects: One, that it has suggested that the usual formulation justifying search and seizure was on the people protected from unreasonable search and seizure. Putting a privacy provision in there has suggested that anything that the privacy provision protects a citizen from unreasonable search and seizure. Putting a privacy provision in there has suggested that anything that the privacy provision protects a citizen from unreasonable search and seizure. On one hand, on the other hand, there have been courts that have used that privacy provision to require a higher demonstration to protect the search and seizure area. The three states that have independent or free-standing rights do not have language the same as ours. Ours is differ-

ent and it was carefully chosen to reflect a number of interests and though it has been referred to as the right to privacy, the word privacy no where appears. It's the right to be let alone and there is some historical significance to that phraseology, number one, and number two: It was thought by the Revision Commission that if language not similar to the federal language were used, that the Florida Supreme Court would be more inclined to give this provision an independent and state-based determination.

Sen. Dunn: The language that has been used - right to be let alone and free from governmental intrusion - those will be words of constitutional art and by your use in them I assume that you ascribe some meaning to them or you, or those who have written them. Now what specific governmental activity would this prescription relate to, in other words, right to be let alone in what context and free from what governmental intrusion into what?

Pat Dore: Well, Senator, we have not attempted to define and no writer that I have read has attempted to define precisely what it does mean. However, look at it in its full context. In the first place, the right attaches to natural person. That was done deliberately so that we were talking about is protecting a fundamental aspect of human liberty. The right to be let alone, as I indicated, has historical significance, it was used first in 1880 by Judge Coolidge when

he has writing his Treatise on Torts and was followed up ten years later in the famous Brandeiss letter/review article in Harvard that was credited for laying the predicate for the recognition of the right to invasion of privacy tort. Since that time, the language has appeared in the U.S. Supreme Court Opinion whenever the court was talking about an aspect of human liberty, for example, Justice Brandeiss referred to the right to be let alone in his famous Olmstead dissent by saying that it is the most comprehensive of rights and the right most valued by civilized men. I suspect that Justice Brandeiss, along with you and along with me and everyone in this room has a sense of what his or her privacy is and what it means to them. This provision attempts to elevate, to protect, that principle, within some limitations. The first limitation is that it is only government intrusion into one's private life. That phrase is a limit and suggests that there's not a complete immunity from government interference or government regulation. Rather, there has to be that there is some zone of privacy in something . . . a private life that we all have. Before the right could attach, it would seem that there would have to be some reasonable expectation of privacy before the right would attach and anything that is knowingly or publicly done would not be considered an intrusion into one's private life.

Sen. Dunn: One further question and I won't monopolize your presentation. Do you know of any statute that is on the books now, that would be or arguably, would be invalidated by the adoption of this language?

Pat Dore: No, I don't, Senator, but I don't hold myself out as having a full command of everything in the Florida Statutes. I don't think so. Although, I am a little fearful because of my knowledge. A couple weeks ago, the Senate President made some statement about his great concern about the disclosure of certain information that was being collected by the Secretary of State's office. I don't know whether that is authorized by statute, I guess it maybe is authorized by statute otherwise they couldn't be doing it. And I share, this amendment would provide some opportunity for a person to challenge disclosure of private information.

There is a question here by Sen. Thomas which is not audible which refers to language in the staff analysis.

Pat Dore: No, Senator, what that language, that jargon, fits into is this balancing process that I was referring to earlier. That is before a government intrusion into one's private life could be sustained in the face of a concept with this right, the government interest would have to be very substantial, would have to be compelling and the means that the government selects in order to achieve that end would have to be necessary, the correlation would have to be very direct.

The staff summary suggests that this standard of review ought to be put into the language and I would suggest to you, Senator Thomas, that we had a lengthy debate on this question in Constitutional revision. It was rejected for this reason: that, first of all, the suggestion, if you attach it to this right, and it's no where else attached to any right in the Declaration of what's in the Florida Constitution now, that it raised the question that what is the standard to be used with respect to those. The practical matter the Florida Supreme Court now does use, the so-called compelling need upon, well that just

* * *

is the fundamental quality so that I would reject the suggestion because it may create confusion and in any event, by stating the right in absolute terms, we expect the same result from the judiciary.

Sen. Barron: Senator Myers, you look pensive.

Sen. Myers: Well, since the Supreme Court and all of their rights of privacy cases has used that term compelling state interest, I see no reason why we shouldn't put it in. So it would read: "Every natural person has a right to be let alone and free from governmental intrusion into his private life except as necessitated by a compelling state interest" and then when you had any particular statute that there had to balance the question of right of privacy against the state interest, you would have to spell it out in the statute

as to what the compelling state need was with the statute and I think that's a healthy way to approach individual items along the way. I don't see any reason why you couldn't have that language in there.

Pat Dore: Senator, I would just suggest to you, the problem that that causes for the other provisions in the Declaration of Rights, that you don't have . . . there are actually two objections to using that language, in fact, was in the first bill that the Revision Commission considered.

Sen. Myers: The other Declaration of rights are more or less absolute or at least they have been argues [sic] to be so, but the right of privacy has never been argued to be an absolute right. It's always been a balancing act between government on the one hand, and the rights of individuals on the other.

Pat Dore: That's correct, sir, but that's correct with respect to every constitutional right. I know of no absolute constitutional rights—even the first amendment which is stated in the most absolute terms that we can come up with in the English language, "Congress shall make no law" has not been construed that way. The compelling state interest standard is a standard that the court uses to determine whether the act is an infringement of one's free speech or the right of free press.

Sen. Myers: Well, Justice Douglas would have disagreed with you.

Pat Dore: Oh, yes sir, Justice Douglas and Justice Black, but they are the only two absolutists in our history and those two have never commanded a majority.

Sen. Barron: Alright, Senators, we have time restraints relative to the Committee on Commerce meeting and we want to hear single-member districts. Senator...

* * *

Sen. Gordon: Mr. Chairman, you remember the Constitutional Revision Commission, what was your position when this came up?

Sen. Barron: I voted for it then and I'll vote for it now.

Sen. Gordon: Move the bill.

Sen. Myers: Well, you don't want to put anything in about compelling state need?

Sen. Gordon: I listened. . . I didn't think that your argument was sufficiently compelling, Senator. I really . . . if you think about the first amendment cases, you thank [sic] about the separation cases, if the court is going to take into account the compelling state interests when constitutional rights conflict, then why do you have to single this one out, since it's going to be there anyway, I gather and it would tend to put this right in a different category then the others, which is something that we don't want to do.

Sen. Barron: Senator, couldn't ya'll discuss this back in Dade County, because the President's waiting. Call the roll.

SJR 935 REPORTED FAVORABLY OUT OF RULES COMMITTEE.